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ALEXANDER L. STEVAS
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NO._____

IN THE UNITED STATES SUPREME COURT

October Term 1983

GEORGE E. HILLER, Petitioner

v.

STATE OF ALASKA

On Writ of Certiorari to the Superior Court of the State of Alaska, Third Judicial District, at Anchorage

PETITION FOR WRIT OF CERTIORARI

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Assisting in Petition

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STATEMENT OF JURISDICTION

The Judgment on Appeal was entered by the Superior Court for the State of Alaska, Third Judicial District at Anchorage, on February 9, 1983, (Appendix A, infra, page A-2), affirming the judgment convicting Petitioner, George E. Hiller, of violation of A.S. 28.35.030 entered by the District Court for the state of Alaska, Third Judicial District at Anchorage, on May 24, 1983, (Appendix A, infra, page A-1). Under Alaska law, Hiller had no further right to reveiw, as a matter of right, after the Judgment on Appeal was entered by the Superior Court for the State of Alaska.

Hiller's timely petition for hearing to the Court of Appeals of the State of Alaska was denied on March 30,

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STATEMENT OF JURISDIICTION

The Judgment on Appeal was entered by the Superior Court for the State of Alaska, Third Judicial District at Anchorage, on February 9, 1983, (Appendix A, infra, page A-2), affirming the judgment convicting Petitioner, George E. Hiller, of violation of A.S. 28.35.030 entered by the District Court for the state of Alaska, Third Judicial District at Anchorage, on May 24, 1983, (Appendix A, infra, page A-1). Under Alaska law, Hiller had no further right to reveiw, as a matter of right, after the Judgment on Appeal was entered by the Superior Court for the State of Alaska.

Hiller's timely petition for hearing to the Court of Appeals of the State of Alaska was denied on March 30,

1983, (Appendix A, infra, page A-3). Hiller's timely petition for hearing to the Supreme Court of the State of Alaska was denied on June 3, 1983, one justice dissenting (Appendix A, infra, page A-4).

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(3). The Superior Court for the State of Alaska, Third Judicial District at Anchorage is the highest court of the State of Alaska in which a decision could be had within the meaning of 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

STATUTES

18 U.S.C. § 1385

§ 1385. Use of Army and Air Force as posse comitatus

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more that $10,000 or imprisoned not more than two years, or both.

28. U.S.C. § 1257 (3)

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is

drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

A.S. § 28.35.030

Sec. 28.35.030. Operating a vehicle, aircraft or watercraft while intoxicated.

(a) A person commits the crime of driving while intoxicated if the person operates or drives a motor vehicle or operates an aircraft or a watercraft.

(1) [Effective until January 1, 1983] while under the influence of intoxicating liquor, depressant, hallucinogenic, stimulant or narcotic drugs as defined in AS 17.10.230(13) and AS 17.12.150(3);

(2) when there is 0.10 percent or more by weight of alcohol in the person's blood or 100 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.10 grams or more of

alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of intoxicating liquor and other substance.

RULES

Alaska Evidence Rule 412

Rule 412. Evidence Illegally obtained.

Evidence illegally obtained shall not be used over proper objection by the defendant in a criminal prosecution for any purpose except:

(1) a statement illegally obtained in violation of the right to warnings under Miranda v. Arizona, 384, U.S. 436 (1966), may be used in a prosecution for perjury if the statement is relevant to the issue of guilt or innocence and if the prosecution shows that the statement was otherwise voluntary and not coerced; and

(2) other evidence illegally obtained may be admitted in a prosecution for perjury if it is relevant to issue of guilt or innocence and if the prosecution

shows that the evidence was not obtained in substantial violation or rights. (Added by Supreme Court Order 364 effective August 2, 1979.

ALASKA CRIMINAL RULE 12(b)(3)

Rule 12. Pleadings and Motions Before Trial--Defenses and Objections.

(b) Pre-Trial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Any or all of the following shall be raised prior to trial.

(3) Motions to suppress evidence on the ground that is was illegally obtained;

STATEMENT OF CASE

On or about December 21, 1981, the petitioner, George E. Hiller, a civilian, was operating a motor vehicle on a public road in the vicinity of an entrance gate to Elmendorf Air Force Base, a military installation near Anchorage, Alaska. As he approached the gate, AIC Andrew W. Elms 009-48-8005, U. S. Air Force Security Police, instructed Hiller to turn off his vehicle, get out of the vehicle, display his drivers license and identification and to come into the "gate shack" as Elms had suspected Hiller of drinking while driving. Upon entering the "gate shack" AIC Elms contacted U. S. Air Force Security Policeman, Staff Sgt. Strickland and Staff Sgt. Drysdale and requested that they come from their positions on the base to the "gate shack"

to assist in the apprehension and interrogation of Mr. Hiller. While at the "gate shack" Hiller was interrogated, "frisked", and thereafter transported by the Military Police to the Security Police Headquarters Office, located on the Base.

While at the Security Police Headquarters, Hiller was further interrogated, requested to sign an implied consent warning form, advised of his constitutional rights, and forcibly detained in the Security Police Headquarters after he had indicated his desire to leave the building and had attempted to do so.

Upon completion of the iterrogation by the U. S. Air Force Security Police, the defendant was placed in handcuffs and was thereafter

transported by a U. S. Air Force security police vehicle to the State Courthouse in Anchorage, where he was booked, and subsequently released on his own recognizance. Prior to the transportation of Hiller to the State Courthouse the Military Police had not at any time attempted to contact civilian police authorities. Hiller had been stopped, forced out of his vehicle, interrogated, "frisked", transported onto the military installation to security police headquarters where he was detained against his will, further interrogated, and finally transported to civilian authorities for booking, before civilian authorities had any contact whatsoever with this case.

On January 18, 1982, an information was filed by the State

charging Hiller of driving while intoxicated in violation of A.S. 28.35.030, a misdemeanor under Alaska law.

On March 30, 1982, Hiller filed a timely motion to suppress the testimonies of all military personnel involved in the arrest, detention, search and interrogation of Hiller, pursuant to Rule 12(b)(3), Alaska Rules of Criminal Procedure. The grounds for this motion was that the acts of the military personnel constituted a violation of the federal posse comitatus statute, 18 U.S.C. § 1385, and that all evidence obtained in violation thereof should be excluded from trial under the Exclusionary Rule and Rule 412 of the Alaska Rules of Evidence. Rule 412 precludes the use of any illegally obtained evidence in a criminal prosecution except for perjury prosecutions in limited circumstances.

On April 6, 1982, the State filed a Memorandum in Opposition to Hiller's Motion to Suppress arguing that the Exclusionary Rule should not be applied to violations of 28 U.S.C. § 1385. The State did not contest the fact that a violation of the Posse Comitatus Act had in fact occurred. Indeed, the State argured that whether a violation of 18 U.S.C. § 1385 had occurred was irrelevant since the illegally obtained evidence could not be excluded in any event. The State based its position on the Alaska Court of Appeals decision of Harker V. State, 637 P.2d 716 (Alaska App. 1981) which held that an exclusionary rule would not be applied to violations of 18 U.S.C. § 1385, notwithstanding Alaska Evidence Rule 412, since Rule 412 did not apply to violations of statutes, as opposed to violations of constitutional

rights.

On April 12, 1982, the District Court denied Hiller's Motion to Suppress based on the holding of Harker v. State, supra, (Appendix A, infra, page A-5).

The trial was conducted and judgment entered May 24, 1982, convicting Hiller of violation of A.S. 28.35.030.

Hiller thereafter appealed to the Superior Court for the State of Alaska, Third Judicial District at Anchorage, asserting as error the trial court's denial of his motion to suppress. Hiller again argued that the testimonies of the military personnel should have been excluded as evidence obtained in violation of 18 U.S.C. § 1385. At the time Hiller's appeal was perfected and being considered by the Superior Court, the Supreme Court of Alaska had accepted a petition for

hearing filed by the defendant in Harker, supra, to determine the validity of the decision by the Alaska Court of Appeals in that case that an exclusionary rule would not apply to violations of 18 U.S.C. § 1385.

On February 9, 1983, the Superior Court entered its Judgment on Appeal affirming the District Court's judgment of conviction (Appendix A, infra, page A-2). The Superior Court in its Judgment on Appeal stated only that it would not set aside a finding of fact by the trial court unless it was clearly erroneous, and that the trial court was not clearly mistaken, dispite the fact that Hiller did not dispute any findings of fact in his appeal but only disputed the trial court's rulings on questions of law.

Thereafter, Hiller timely filed a petition for hearing in the court of Appeals of the State of Alaska. On March 30, 1983, the Court of Appeals entered its order denying Hiller's petition (Appendix A, infra, page A-3).

On April 14, 1983, Hiller timely filed a petition for hearing in the Supreme Court of the State of Alaska. On May 6, 1983, before ruling on Hiller's petition for hearing, the Alaska Supreme Court rendered its decision in Harker v. State (Opinion No. 2665) reported at 664 P.2d 932 (Alaska 1983). The Alaska Supreme Court reversed the Court of Appeals' holding that Alaska Evidence Rule 412 is limited to violations of constitutional rights only and not to violations of statutes, including 18 U.S.C. § 1385 should be suppressed.

On June 3, 1983, the Alaska Supreme Court denied Hiller's petition for hearing. One justice dissented, stating that he would have granted the petition and remanded to the Court of Appeals for reconsideration in light of the court's May 6, 1983 decision in Harker v. State, 664 P.2d 932 (Alaska 1983). (Appendix A, infra, page A-4).

Hiller now brings this petition to review the decision of the Superior Court for the State of Alaska, Third Judicial District at Anchorage, dated February 9, 1983. The highest court of Alaska from which a decision could be had for purposes of 28 U.S.C. § 1257.

REASONS FOR GRANTING WRIT

Whether an exclusionary rule should be applied to bar evidence illegally obtained in violation of 18 U.S.C. § 1385, a federal felony statute, is an important question of federal law which has not been, but should be, settled by this court. It is a question which has received conflicting answers in the federal and state courts.

Furthermore, Hiller has effectively been denied his right to a fair and full appeal of his conviction. Neither the trial court or the Superior Court found that no violation of the Act occurred. Yet both courts held that the evidence could not be excluded under Alaska Evidence Rule 412 based on the holding in Harker v. State, 637 P.2d 716

(Alaska App. 1982), which holding was later reversed in Harker v. State, 664 P.2d 932 (Alaska 1983).

18 U. S. C. § 1385, commonly known as the Federal "Posse Comitatus" statute provides as follows:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or an Act of Congress, willfully uses any part of the Army or the Air Force as a "Possee Comitatus" or otherwise to execute the law shall be fined not more than $10,000 or imprisoned not more than two years or both.

The proscription contained in 18 U. S. C. § 1385 against the infringement of the Military in Civilian law enforcement is as viable and important today as the day of its original enactment. See Wrynn v. United States, 200 F. Supp. 457 (E. Dist. New York 1961); People v. Burden, 288 N.W.2d 392 (Mich. App. 1980); Taylor v. State, 645 P.2d 422 (Okla. Crim. App.

1982); see, Congressional Reports to the Department of Defense Authorization Act of 1982, 1981 U. S.Code of Congressional Administrative News 1781, et seq.

The purpose and legislative history of the Posse Comitatus Act have been set forth in various cases which make it clear that Congress intended to preclude the military from assisting local law enforcement officers in carrying out their duties, and to maintain this Nation's historical, if not constitutional, mandate for separation of the military from civilian affairs. This mandate is implicit in the constitutional rights of United States citizens to be free from the imposition of martial law, dating back at least to the era when this Nation was formed. See, Wyrnn v. United States, supra; Gillar v. United States, 182 F.2d.

962 (D.C. Cir. 1950); People v. Blend, 175 Cal. Rptr. 263 (June, 1981); United States v. Red Feather, 392 F. Supp. 926 (Dist. S.D. 1975); and see 1981 U. S. Code of Congressional and Administrative News at 1781 et seq.

The import of this Country's prohibition against the military engaging in civilan affairs is suggested by the words of Chief Justice Burger in the case of Laird v. Tatum, 408 US 1, 92 S. Ct. 2318, 33 L.Ed. 2d 154 (1972) as follows:

> The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveilance activities-and indeed the claims alleged in the complaint-reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition tradition has dep roots in our history and found early expression for example in the Third Amendment explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.

> These prohibitions are not directly presented by this case, but the philosophical underpinnings explain our traditional instance on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, Federal Courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nations history or in this Court's decided cases, including our holding today, that can properly bee seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

408 U.S. 1 at 14-15

It is clear beyond question that Congress intended to provide all citizens of this country the right to be free from the execution of civilian laws by military authorities, and Congress has further provided that violation of this mandate will constitute a federal felony with a possible sentence of as much as $10,000

and two years imprisonment. While there have been no prosecutions for violation of the Posse Comitatus Act, there are numerous cases noting a violation of the Act. See for example Taylor v. State, supra; State v. Danko, 548 P.2d 819 (Kan. 1976); United States v. Walden, 490 F.2d 372; cert denied 416 US 983, 94 S.Ct. 2385, 49 L.Ed.2d 760 (1974), (actually a violation of a Navy Instruction analagous to the Posse Comitatus Act); Wrynn v. United States, supra.

There are other cases addressing the issue in which Courts have found no violation of the act occurred. In the Oklahoma Criminal Appeals Court, for example, no violation was found in the following three cases: Lee v. State, 513 P.2d 125 (Okla. Crim. 1973); HilderBrand v. State, 507 P.2d 1323 (Okla. Crim.

1973); Hubert v. State, 504 P.2d. 1245, (Okla. Crim. 1972). In all of these cases no violation of the act was found on the grounds that the military personnel assumed no greater authority than that of a private citizen, or were not acting in their official status as military personnel and were therefore competent witnesses, irrespective of §1385. These cases were criticized in Meeks, "Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act", 70 Mil. L.Rev. 83, at 112-113 (1975), and distinguished in Taylor v. State, supra, the latest case on point from the Oklahoma Court of Criminal Appeals. In Taylor the Court distinguished the three prior Oklahoma cases of Hubert, HilderBrand, and Lee, supra, in holding that the Act had been violated on the grounds that in

Taylor a military policeman who had conducted a search acted solely under the authority of his military status rather than the mere participation as a private citizen, and for that reason evidence obtained by his search in violation of §1385 was supressed.

Other cases have followed the reasoning of the three prior Oklahoma cases in holding that no violation of the Posse Comitatus Act occurred on the grounds that the military personnel involved acted only in their individual capacity and not in their status as military personnel, or on the grounds that the military personnel were acting only under their official military duties enforcing the military law. See for example U. S. v. Hartley, 678 F. 2d 961 (Ct. App. Fla. 1982); People v. Blend,

supra; and three North Carolina cases, State v. Sanders, 281 S.E.2d 7 (N.C. 1981); State v. Trueblood, 265 S.E.2d 662 (N.C. App. 1980); State v. Nelson, 269,S.E.2d 629 (N.C. 1979).

Some Courts have held that evidence obtained in violation of the statute will be supressed. See e.g., Taylor v. State, supra; People v. Burden, 288 N.W. 2d (Mich. App. 1979), reversed on other grounds 303 N.W. 2d 444 (Mich. 1981). Other Courts have held that evidence obtained in violation of the Statute would not warrant invocation of the Exclusionary Rule under the facts of the particular case. All of these cases which fail to apply the Exclusionary Rule relied on the 1974 Fourth Circuit case of United States v. Walden, 490 F. 2d 372.

The Court in Walden did not in fact decide whether a violation of the Posse Comitatus Act itself would warrant an exclusionary rule. The Court held that the Posse Comitatus Act did not apply to the use of Marines to enforce Federal Laws, but rather addressed the issue of whether a violation of a Navy regulation prohibiting the use of Navy personnel for the enforcement of civilian law would warrant an invocation of the exclusionary rule. The holding in Walden was a limited one - more specifically that the exclusionary rule would not be applied to the violation of the Navy regulation under these facts at this time. At page 373 the Court states its holding as follows:

> We do not think the letter of the Act was violated. We conclude however, that there was a violation of the regulations; but because this

> case presents the first instance of which we are aware in which illegal use of military personnel in this manner has been drawn into question, we decline to impose the extraordinary remedy of an exclusionary rule at this time, or to reverse the judgments. We reserve, however, the possibility that such a rule may be called for should repeated cases involving military inforcement of civilian laws demonstrate the need for a special sanction of a judicial deterrent. (Emphasis Added)

In Walden four factors were stressed in the Court's decision not to fashion an exclusionary rule for violation of the navy regulations:

1. The prohibition contained in the regulation was not clear and well known;

2. The regulation expresses a policy "for the benefit of the people as a whole,

but not one that may fairly be characterized as expressly designed to protect the personal rights of defendants";

3. Since the regulation provided no mechanism for its own enforcement, the admission of the evidence obtained in violation of the regulation would not "require the court to condone "dirty business""; and

4. The case presented the first instance in which military personnel had been used to investigate civilian crime in violation of the regulation.

Walden, supra, at 377.

While these reasons espoused by the Walden court may have been valid at the time and in that factual situation, they are not valid at this time under the facts of this case.

The first reason--that the prohibition contained in the Posse Comitatus Act was not clear nor well known, while it may have been true in 1974 when Walden was decided, certainly no longer holds true today. The prohibitions contained in the Act have become very well known since 1974. Appellant is aware of no fewer than twenty-four cases in which litigants have attempted to enforce the prohibition of the Act since the Walden decision was handed down, and two Law Review articles.

Thus, it is no longer correct to say that the Posse Comitatus Act is not well known in the legal community.

The second basis for the Walden court's refusal to invoke the exclusionary rule for violation of the regulation was that the Posse Comitatus Act was intended

to benefit the people as a whole rather than individual rights. Appellant suggests that this rationale is unfounded. The purpose of the Posse Comitatus Act as stated previously in this brief is to maintain the separation of military and civilian authorities. It is to protect all members of civilian society from the imposition of marshal law and the transgression of military into the enforcement of civilian law. No right conferred by the constitiution or laws of this country may benefit society as a whole without concomittantly benefiting the members thereof.

The third reason given by the Walden court for nonexclusion was that no "dirty business" would be condoned by admitting evidence obtained in violation of the regulation. This reasoning is inapposite to the case at bar. In Walden, the

subject Navy instruction which was violated, provided "no mechanism for its own enforcement--and especially no criminal sanction for its violation--and that its legal effect was far from obvious, mean[ing] that admission of the evidence of guilt does not require the court to condone "dirty business"". Walden, supra at 377. However, unlike the Navy regulation at issue in Walden, the Posse Comitatus Act provides criminal sanctions for its violation. In the instant case, Hiller was convicted of a misdemeanor on evidence obtained directly in violation of the of the Posse Comitatus Statute. In other words, a federal felony has been committed in order to convict Hiller of a misdemeanor. Admission of the evidence gained in violation of the Act directly effects the integrity of our

judicial system by allowing evidence gained by criminal means to be presented in order to establish the guilt of an individual charged with a misdemeanor.

The fourth reason given for nonexclusion in the Walden case--that it was the first instance of violation of the instruction that the Court was aware of, is no longer valid at this time. This is certainly not the first case in which violation of the Act has occurred, as previously stated in this brief. Furthermore, many of the decisions addressing the issue which have held no violation are questionable. See, Note, The Possee Comitatus Act, 13 Am. Crim. L.R. 703 (1976).

Whether the violation of the Posse Comitatus Act is a direct violation of a Constitutional right or not, it is

sufficiently repugnant to traditional rights afforded to all Americans in this Country to warrant an exclusionary rule. This is particularly true in light of the fact that while there have been numerous violations of the Act in the past there have been no reported prosecutions for such violations. Jackson v. State, 572 P.2d 87, (Alaska 1977), at 90, Note 9. Thus, there is a very real danger that the rights of Americans to be free from military intrusion into civilian affairs will continue to be unnoticed and unremedied if the Exclusionary Rule is not applied in this case. The United States Supreme Court in Lee v. Florida, 392 U.S. 378, L.Ed. 2d 1166 (1968) expressly held that Exclusionary Rule should be applied for violations of Federal Law as well as specific constitutional rights, to

preserve the integrity of the judicial system, particularly where the only effective available means of enforcing the Federal Law is by removing the incentive to disregard it. In Lee, supra, the Court stated as follows:

> But the decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the "imperative of judicial intergrity." Elkins v. United States, 364 U.S. 206, 222, 4 L.Ed. 2d 2669, 1680. Under our Constitution no court, state or federal, may serve as an accomplice in the wilful trangression of "the Laws of the United States," laws by which "the Judges in every State [are] bound...(cite omitted) Finally our decision today is counseled by experience. The hope was expressed in Swartz v. Texas that "[e]nforcement of the statutory prohibition in §605 can be achieved under the penal provisions" of the Communications Act. 344 U.S., at 201 (cite omitted). That has proved to be a vain hope. Research has failed to

> uncover a single reported prosecution of a law enforcement officer for violation of §605 since that statute was enacted. (cite ommitted). We concluded in Elkins and in Mapp, that nothing short of a mandatory exclusion of the illegal evidence will compel respect for the Federal Law "in the only effectively available way--by removing the incentive o disregard it." Elkins v. United States, 364 U.S., at 217.

Lee, supra, 392 U.S. at 385-87, 20 L.Ed. 2d at 1172-73.

The mandate expressed in Lee v. Florida is equally applicable to the case at bar. The "imperative of judicial integrity" requires that the evidence obtained in this case in violation of a federal felony statute cannot be used in the courts of this counry. If Courts allowed the admission of such evidence they would "serve as an accomplice to the

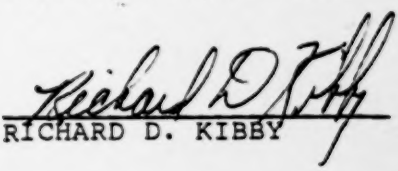
wilful transgression of the laws of the United States". Due to the fact that there have been no prosecutions for violation of the Posse Comitatus Act, the enforcement of the statutory prohibition against the use of the military for enforcement of civilian law has not been achieved under the penal provisions of the Act. Furthermore, since no private right of action exists for violation of the Act, it can not be enforced by those means. Lamont v. Haig, 539 F.Supp. 552 (D. S.D. 1982); Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977). Thus, as was the case in Lee, nothing short of mandatory exclusion of the illegal evidence will compel respect for this federal law.

CONCLUSION

The Petitioner respectfully request's this court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

DENNIS, KIBBY & MOSS



RICHARD D. KIBBY

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APPENDIX

IN THE DISTRICT COURT FOR THE STATE OF Alaska — In the Trial Courts STATE OF ALASKA THIRD DISTRICT

AT ANCHORAGE

MAY 24 1982

Clerk of the Trial Courts
By [illegible] Deputy

(xx) STATE OF ALASKA
Plaintiff,
vs.
GEORGE E. KELLER
Defendant
DOB: 6/9/40

CASE NO. 3AN-82I-417 CR

TYPED JUDGMENT

Name of Defendant GEORGE E. KELLER
Date of Offense 12/21/81
Crime charged: DRIVING WHILE INTOXICATED
Statute or Ord. 28.35.030 Driver's License # _____

[ ] guilty plea [ ] no contest plea [ ] court trial [XX] jury trial

JUDGMENT

[ ] NOT GUILTY. IT IS ORDERED that the defendant is acquitted and discharged.

[XX] GUILTY of the crime named above.

[ ] GUILTY of _____

Any appearance bond in this case is exonerated.

SENTENCE

[ ] Imposition of sentance is suspended and defendant is placed on probation until _____, 19__.

[XX] Sentance is imposed as follows:

[XX] Defendant is fined $ 250.00 with $ _____ suspended. The unsuspended $ 250.00 is to be paid _____ MAY 24, 1982. FINE MAY REMAIN AS APPEAL BOND.

[XX] Defendant is committed to the custody of the Commissioner of Health and Social Services to serve 30 days with ALL BUT THREE days suspended. The unsuspended 72 HRS. hours are to be served STATUTE MINIMUM APPEAL

[ ] Defendant is ordered _____

[XX] Defendant is placed on probation until MAY 24, 1983, 19__.

[X] Defendant's [illegible] (driver's) license (# _____) is (revoked) [illegible] for 90 (days) [illegible] and any such license is to be immediately surrendered to the court. A limited license shall be issued with the following limitations: _____

[XX] The conditions of defendant's probation are: NO SIMILAR VIOLATIONS FOR ONE (1) YEAR. COMPLY WITH RECOMMENDATION OF ALCOHOL SCREENING. SENTENCE STAYED PENDING APPEAL PENDING APPEAL DECISION

MAY 24, 1982
DATE

JUDGE

I certify that on _____ BY: _____
copies of this form were sent to:

CLERK: 14
CR-460 (6/81) (st.5)

2-11-83
B

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

GEORGE E. MILLER,
Appellant,
vs.
STATE OF ALASKA,
Appellee.
Case No. 3AN82-427 Cr.

JUDGMENT ON APPEAL

This is an appeal from a judgment of the District Court entered May 27, 1982.

The appellate court will not set aside a finding of fact of the lower court unless it is clearly erroneous. Trover v. State, 614 P.2d 313, 318-19 (Alaska 1980); see also Juneby v. State, 641 P.2d 823, 834 (Ak. App. 1982).

Upon review of the file herein, the proceedings in the lower court regarding same, the briefs filed by the parties herein, and having heard oral argument on February 9, 1983, this court deems itself fully advised in the premises and finds that the lower court was not clearly mistaken. Therefore,

IT IS ORDERED that the judgment of the District Court is AFFIRMED.

DONE at Anchorage, Alaska, this 9th day of February, 1983.

Ralph E. Moody
Superior Court Judge

I certify that on 2-9-83, a copy of the above Judgment on Appeal was forwarded to the following at their addresses of record:

DA/R.Babcock
A.D.Kibby

Secretary to Judge Moody

Filed and Entered 3/31
APPELLATE COURTS of the
STATE of ALASKA
MAR 30 1983
ROBERT D. BACON CLERK
By [illegible] Deputy

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

GEORGE E. HILLER,
Petitioner,
vs.
STATE OF ALASKA,
Respondent.

Court of Appeals No. 7536

O R D E R

Superior Court No. 3AN8 82-417 Cr.

Before: Bryner, Chief Judge, Coats and Singleton, Judges

On consideration of the petition for hearing filed February 24, 1983 and the opposition to the petition filed March 11, 1983,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on March 30, 1983.

CLERK OF THE COURT OF APPEALS
ROBERT D. BACON

cc: Judges
Counsel
The Honorable Ralph E. Moody
A.H. Ziel
G. Goodfellow

IN THE SUPREME COURT OF THE STATE OF ALASKA

GEORGE E. MILLER,

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

Supreme Court No. 3784

O R D E R

Trial Court No. 3AN 81-427 Cr.

Before: Burke, Chief Justice, Rabinowitz, Matthews and Compton, Justices.

On consideration of the petition for hearing filed April 14, 1983 and the opposition to the petition filed April 29, 1983,

IT IS ORDERED:

The petition for hearing is denied.

Entered by direction of the court at Anchorage, Alaska on June 3, 1983.

CLERK OF THE SUPREME COURT

ROBERT D. BOCKO

[Rabinowitz, Justice, dissents in part. On the issue relating to the Posse Comitatus Act, he would grant the petition for hearing and remand the case to the Court of Appeals for reconsideration in light of Palmer v. State, slip opinion No. 2565, Alaska May 6, 1983.]

cc: Justices
Counsel
Court of Appeals Judges
The Honorable Ralph E. Moody
Appeals Deputy, Anchorage Trial Courts

ANCHORAGE
STATE VS. GEORGE E. KELLEY CASE NO. 3AN82-427

CHARGE: DAT

NOTICE OF NEXT COURT APPEARANCE/HEARING RECORD
DISTRICT COURT FOR THE STATE OF ALASKA AT ANCHORAGE

* CHECK DAILY CALENDAR POSTED IN THE COURTHOUSE HALLWAYS ON DAY OF APPEARANCE FOR COURTROOM ASSIGNMENT

	DATE	TIME
Calendar Call, Pre-Indictment Hearing		
Preliminary Hearing		A.M./P.M.
Bail Review, Change of Plea		
Sentencing		A.M./P.M.
Motion		A.M./P.M.
Trial - Jury/Non-Jury	5-20-82	A.M./P.M.

Before Judge

Plea: Guilty Not Guilty Nolo Contendere

Bail Fine Jail

Motion to Suppress Statements Granted

By: Text: Clerk's Office Room 140 Present

* FAILURE TO APPEAR AS NOTED ABOVE MAY RESULT IN YOUR ARREST

Judge Clerk

Log Notes

Time 2:41 in 050 2 Day 4-12-82 Time 10:00 A.M./P.M. Prep

Counsel Present: Plaintiff DA Assistant Defendant Kelley

Defendant: Present In Custody Not in Custody Not Present

P.D. Appointed Requested

Def. Atty Kelley on behalf of Pl. motion & Written Memo.
2333 - DA makes no comment
2336 - Court grants motion with comment

Office - Supreme Court, U.S.
FILED
NOV 10 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983
No. 83-415

GEORGE E. HILLER,
Petitioner,

vs.

STATE OF ALASKA,
Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF ALASKA, THIRD JUDICIAL DISTRICT

NORMAN C. GORSUCH
ATTORNEY GENERAL OF THE
STATE OF ALASKA

By: DAVID MANNHEIMER
Assistant Attorney General

Office of Special Prosecutions and Appeals
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JURISDICTION

Hiller has invoked this Court's jurisdiction under 28 U.S.C. §1257(3). While Hiller satisfies the jurisdictional requirement of having received a final judgement of the highest state court in which a decision could be had, the State believes that Hiller has failed to demonstrate either standing or ripeness of the controversy. These matters will be presented in the Argument section of the State's response.

Note on the structure of the Alaska courts:

Hiller was tried in the "district court", a court whose criminal jurisdiction is limited to misdemeanors. A defendant convicted in district court has an appeal as a matter of right, but such a defendant is given the option of pursuing this appeal in either the "superior court" (Alaska's trial court of general jurisdiction) or the "court of appeals" (Alaska's intermediate appellate court for criminal cases). Alaska Stat-

utes 22.07.020(c) and (d), and 22.15.240(b).

Hiller chose to appeal to the superior court; once Hiller made this choice, further review by either the court of appeals or the Alaska supreme court was discretionary.

The superior court affirmed Hiller's conviction. The court of appeals, and later the Alaska supreme court, declined to review the superior court's decision. Thus, the superior court's affirmance of Hiller's conviction is the final judgement necessary to satisfy 28 U.S.C. §1257.

QUESTIONS PRESENTED

1. Hiller is asking this Court to rule upon the issue of whether the exclusionary rule should be applied as a remedy for violations of the "Posse Comitatus Act", 18 U.S.C. §1350.

The State of Alaska believes the question presented more properly is: Should the Court take up this issue in a case where the state courts have ruled that the Posse Comitatus Act was in fact not violated, and where the Alaska supreme court has expressly left open the issue of whether the remedy for a Posse Comitatus violation should be suppression of evidence?

2. Hiller alleges that he was stopped by air force security personnel as he attempted to drive his vehicle onto Elmendorf Air Force Base while apparently intoxicated, and that he was then questioned and given "field sobriety tests" (tests of physical coordination and mental dexterity) by the air force security police before being turned over to the civilian authorities.

Even in the light most favorable to Hiller, do Hiller's allegations establish a violation of the Posse Comitatus Act?

3. Assuming that Hiller has a colorable claim that the Act was violated in his case: to the extent that Hiller's ability to have his Posse Comitatus claim heard in the Alaska courts was hampered by a change in the Alaska law on the subject of Posse Comitatus that occurred while Hiller's case was on appeal, should Hiller be raising this problem for the first time in a petition for certiorari to this Court or should he first pursue the remedy available to him under state law?

STATUTORY PROVISIONS INVOLVED

The Posse Comitatus Act, 18 U.S.C. §1350, provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

Alaska Criminal Rule 35(c)(7) provides:

> Post Conviction Procedure -- Scope. Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> . . .
>
> (7) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence, when sufficient reasons exist to allow retroactive application of the changed legal standards;
>
> may institute a proceeding under this rule to secure relief.

STATEMENT OF THE CASE

Elmendorf Air Force Base directly borders the city of Anchorage, Alaska. On December 21, 1981, George Hiller was driving his car toward the entrance to Elmendorf AFB. As Hiller's car neared the entrance to the base, the sentry on duty at the "gate shack" (the sentry box at the entrance to the base) saw Hiller's car veer toward the right edge of the road, then swerve completely across the on-coming lane and almost crash into the snow berm on the other side of the road. Hiller's car then came to a stop just outside the entrance to the base.

The sentry went up to Hiller's car and asked Hiller to step outside his vehicle; Hiller had difficulty standing and walking back to the gate shack. Inside the gate shack, Hiller stumbled repeatedly against the wall and had difficulty maintaining his balance; his speech was slurred, and he smelled strongly of liquor.

The sentry called two Air Force

military policemen to take charge of Hiller. These two military policemen asked Hiller to perform field sobriety tests, and questioned him about his driving and his drinking. At the end of this interview, the air force police took Hiller to the Anchorage courthouse and turned him over to civilian authorities.

Hiller was charged with the misdemeanor of operating a motor vehicle while intoxicated, under Alaska Statute 28.35.030. Trial by jury was scheduled in the district court in Anchorage.

Before trial, Hiller moved to have the testimony of the three airmen (the sentry and the two military policemen) suppressed on the ground that the Posse Comitatus Act had been violated when the Air Force personnel detained and then questioned him.

However, the Alaska court of appeals had recently (in fact, 10 days before Hiller's arrest) issued its opinion in the case of Harker v State, 637 P.2d 716 (Alaska App. 1981). In Harker, the court of appeals ruled that even in cases where the Posse Comitatus

Act had been violated the remedy was not suppression of the evidence.

Thus, the prosecutor responded to Hiller's suppression motion by first arguing that the Act had not been violated, but then by pointing out that the issue of whether the Act had been violated was really irrelevant: under controlling Alaska law, even if the Act had been violated Hiller would still not be entitled to suppression of the air force officers' testimony. The motion judge denied Hiller's motion.

On the day of trial, after the jury had been selected but before the testimony began, Hiller renewed his Posse Comitatus claim -- with a new twist: instead of asking for suppression of the airmen's testimony, Hiller's attorney asked the trial judge to warn the three air force officers who had come to testify of their Fifth Amendment privilege, of the fact that the Posse Comitatus Act had apparently been violated, and of the fact that the airmen might be prosecuted based on their testimony.

In response to this renewed

motion, the trial judge (not the same judge as before) ruled that even if Hiller's offer of proof as to the facts of the case were accepted in all details, there still had been no violation of the Posse Comitatus Act.

The trial judge ruled that, in order for the Act to have been violated, three conditions had to have been met: (1) the involvement of the airmen must have arisen at the instigation of civilian authorities, (2) the actions of the airmen must have been aimed primarily at accomplishing civil law enforcement goals rather than military purposes, and (3) the actions of the airmen must have gone beyond merely arresting a person who broke the law in their presence (since any citizen would be entitled to do as much).

Under Hiller's offer of proof, the judge conceded, the airmen had performed acts in excess of merely arresting a suspected lawbreaker; but the judge found that, even taking Hiller's offer of proof as true, Hiller had failed to establish conditions (1) and (2) --

that is, he had failed to prove either that the actions of the air force security police had been instigated by the civil authorities or that their actions had been aimed primarily at a civil, rather than a military, purpose.

Based on this ruling, the trial judge refused to instruct the air force witnesses that they should be aware of possible Fifth Amendment problems if they testified.

The State relied upon the air force officers' testimony at trial, and the jury convicted Hiller. Hiller appealed his conviction to the superior court on the ground that the suppression issue had been wrongly decided.

The superior court affirmed Hiller's conviction by order dated 9 February 1983. (Appendix to Hiller's petition, page 1) The superior court's ruling on appeal does not mention Harker at all; instead, the court's order states that the decision on appeal was based on the legal theory that a trial court's findings of fact should not be disturbed

unless shown to be clearly erroneous.

Hiller then brought a "petition for hearing" to the court of appeals, asking that court to exercise its power of discretionary review under Alaska Appellate Rule 302(b). On March 30th, the court of appeals declined to take Hiller's case, whereupon Hiller brought a petition for hearing to the Alaska supreme court.

Several months earlier, the state supreme court had accepted the Harker case for hearing; and on May 6th, while Hiller's petition for hearing was pending, the supreme court issued a new, superseding opinion in Harker v State, 663 P.2d 932 (Alaska 1983), which completely changed Alaska law on the relationship between the Posse Comitatus Act and the exclusionary rule.

As already noted, the court of appeals had decided Harker I by ruling that a defendant would not be entitled to suppression of the evidence against him even if the Posse Comitatus Act had been violated. In Harker II, the supreme court reversed this holding of the court

of appeals, and instead expressly declined to decide the issue of what the proper legal remedy should be for a violation of the Act. The supreme court was able to do this because it found that, on the facts in Harker, the Act had clearly not been violated.

One month after it issued its superseding opinion in Harker II, the supreme court denied Hiller's petition for hearing.

Hiller now petitions this Court to issue a writ of certiorari.

REASONS FOR DENYING THE WRIT

Hiller, in his petition to the Court, gives two potential reasons for seeking this Court's intervention in his case: first, he wants a ruling on the applicability of the exclusionary rule to cases in which the Posse Comitatus Act has been violated; and second, he claims that his right to a fair appeal process has been violated because the Alaska courts never held a hearing or issued a ruling on the question of whether the Act had been violated or not. (See Hiller's Brief, pages 10-11)

I. THE TRIAL COURT RULED THAT THE POSSE COMITATUS ACT HAD NOT BEEN VIOLATED; HILLER DOES NOT CHALLENGE THIS RULING ON APPEAL, AND THUS HE HAS NO STANDING IN THIS COURT.

It is true that Hiller's suppression motion was denied before trial without an express ruling from the motion judge as to whether or not the Posse Comitatus Act had been violated --

since, under Harker I, Hiller was not entitled to suppression of the evidence anyway.

However, when Hiller tried to stifle the airmen's testimony on the first day of his trial (by asking the judge to deliver explicit Fifth Amendment warnings to the State's witnesses), the trial judge expressly held that Hiller had failed to establish a violation of the Posse Comitatus Act even if his offer of proof were accepted as true. And from the wording of the order issued by the superior court on appeal, it appears that the superior court affirmed Hiller's conviction based on the trial court's finding that no violation had been shown: the superior court's order does not mention Harker, and instead quotes law to the effect that factual findings of the lower court should be affirmed unless shown to be clearly erronecus.

Thus, it is the State of Alaska's position that Hiller indeed received a ruling on the factual issue of whether the Posse Comitatus Act had been violated -- and that ruling was against

him.

Hiller's petition to this Court overlooks this ruling, and instead concentrates solely upon the policy issue of whether violations of the Act should lead to suppression of evidence in ensuing criminal trials. But because of the trial judge's ruling that the Act had not been violated in Hiller's case, Hiller lacks standing to raise the issue of what the proper remedy should be for violations of the Act.

II. EVEN IF THE TRIAL JUDGE'S RULING ON THE FIRST DAY OF TRIAL IS IGNORED, THE EXCLUSIONARY RULE ISSUE IN THIS CASE IS STILL NOT RIPE; NOR HAS HILLER DEMONSTRATED STANDING

Even if the factual ruling at trial is ignored and this case is considered solely upon Hiller's characterization of the underlying facts, Hiller still fails to establish ripeness of the controversy or standing before this Court.

Hiller describes his case as one in which the Alaska courts have

denied him a hearing on the merits of the alleged Posse Comitatus violation, and instead have denied his suppression motion based on the now superseded holding in Harker I that the exclusionary rule would never apply to violations of the Act.

But even Hiller must admit that the Alaska supreme court's refusal to review his case could not have been based on such a rationale -- since, only four weeks before, they had overturned the court of appeals's decision in Harker I and had expressly left undecided the question of whether suppression of evidence would be a proper remedy for a violation of the Posse Comitatus Act.

(The State of Alaska believes that the supreme court's act of simply denying Hiller's petition for hearing, rather than remanding the case for reconsideration in light of Harker II, shows that the court agreed that the facts of the case did not demonstrate any likelihood that the Posse Comitatus Act had been violated.)

But assuming, for the sake of argument, that the trial court's decision to deny Hiller's suppression motion, the superior court's affirmance of his conviction on appeal, and the court of appeals's refusal to review the case were all based on the now-discredited decision in Harker I, and that the Alaska supreme court's decision not to review his case was based only on considerations of the court's workload, Hiller still should not be before this Court now:

Because the controlling Alaska law on the Posse Comitatus question changed after Hiller had exhausted his appeal to the superior court and his petition to the court of appeals, he is in the unusual position of having a "final judgement" even though no Alaska court has ever had to consider or rule upon the question of whether the Posse Comitatus Act was actually violated in his case. At the time Hiller was pursuing his appeal in state court, the applicable law (under the court of appeals's decision in Harker I) was that Hiller would not be entitled to suppres-

sion of the airmen's testimony even if the Act had been violated. Thus, whether the Act had been violated was irrelevant to deciding Hiller's suppression motion, and both the trial court and (on appeal) the superior court would have been able to deny Hiller's suppression motion without ever addressing this issue.

Now, the Alaska supreme court in Harker II has expressly re-opened (and left unresolved) the issue of whether the exclusionary rule should apply to violations of the Posse Comitatus Act. To the extent that Hiller's suppression motion was decided on the basis of Harker I, that legal basis had been undercut.

Thus under Hiller's view of the case he has had a final judgement entered against him, but there still has been no hearing or ruling on whether the Posse Comitatus Act was violated, nor is there now any firm decision by an Alaska court as to whether the proper remedy for such a violation (assuming one were proved) should be invocation of the exclusionary rule.

This being so, then even under

Hiller's characterization of the case he has failed to present a ripe controversy to this Court. There remains an unadjudicated factual issue -- whether the actions of the airmen in Hiller's case violated the Posse Comitatus Act. In addition, because of the Alaska supreme court's decision in Harker II, the further issue that Hiller wants this Court to consider -- the applicability of the exclusionary rule to violations of the Act -- has not been adjudicated against Hiller by the Alaska courts; rather, the Alaska supreme court has expressly left that issue open, awaiting the arrival of a proper case presenting the issue.

Hiller's case is simply not ripe for intervention by this Court. See Abbott Laboratories v Gardner, 387 U.S. 136 at 148-49 (1967).

A related point is that Hiller cannot demonstrate standing to raise the exclusionary rule issue, since -- under his version of the facts -- there has never been an evidentiary hearing nor a court ruling on the issue of whether the

Posse Comitatus Act was violated in his case. A finding that Hiller was in fact injured by a violation of the Act is a prerequisite to his ability to argue that the evidence against him should have been suppressed; thus, he has no standing before this Court: Doremus v Board of Education, 342 U.S. 429 (1952).

III. EVEN TAKING HILLER'S ALLEGATIONS IN THE LIGHT MOST FAVORABLE TO HIM, THE POSSE COMITATUS ACT WAS NOT VIOLATED IN HIS CASE.

The fact situation in Hiller's case -- even under his statement of the facts (see pages 1-3 of Hiller's petition to this Court) -- was that Hiller was driving up to the entrance to a military base in an erratic manner; the sentry stopped Hiller and asked him to get out of his vehicle. When the sentry found that Hiller could barely stand, had difficulty speaking clearly, and smelled of liquor, he summoned two air force policemen who questioned Hiller and had him perform field sobriety tests. Satisfied that Hiller was under the

influence of intoxicating liquor, the air force police turned Hiller over to the civilian authorities. As Hiller asserts (page 3 of his petition), it was not until this time that "civilian authorities had any contact whatsoever with this case".

It is precisely for this reason that the Posse Comitatus Act was not violated in Hiller's case. The air force personnel acted for a proper military purpose -- to prevent an apparently drunk driver from entering the air force base, and to ascertain whether he was in fact intoxicated or was rather in need of medical care, or perhaps both. After finding out that Hiller was very intoxicated but needed no immediate medical attention, the air force police turned Hiller over to the civilian authorities who had jurisdiction over Hiller's offense.

The following discussion is derived from the Alaska supreme court's opinion in Jackson v State, 572 P.2d 87 (Alaska 1977), esp. at pages 89-91:

The Posse Comitatus Act is only

implicated when civilian authorities seek to use military personnel to aid in civilian law enforcement. At common law, the "posse comitatus" referred to the summons issued by a sheriff to all adult males of the county to aid him in keeping the peace or pursuing law breakers; the populace was obliged to obey such a summons or face legal penalties. The Posse Comitatus Act was passed to prevent civilian officials (United States marshalls or others) from using this common law power of posse comitatus to summon the aid of federal troops to keep order and police elections in the South during Reconstruction. And it is this idea of the civilian summoning of military force that remains at the core of the Posse Comitatus Act today.

Where, as in Hiller's case, there has been no request by civilian authorities for military aid, nor any pre-arranged plan for military and civilian authorities to work in concert on matters of civilian law enforcement, the Posse Comitatus Act is not violated. Hiller's detention and questioning arose

from his attempt to drive onto Elmendorf AFB in an apparently drunken condition; this was a matter that the air force personnel were clearly entitled to investigate and prevent, since it involved the safety of the population of the base. Hiller's activities also happened to constitute an offense under the laws of Alaska, so, after assuring themselves that Hiller was indeed drunk, the air force police turned Hiller over to the civilian authorities who had the power to detain and prosecute Hiller for that offense.

These actions do not constitute a violation of the Posse Comitatus Act.

IV. HILLER SHOULD PURSUE HIS REMEDY AT STATE LAW BEFORE PETITIONING THIS COURT.

Leaving all of the foregoing aside, it appears that the real complaint Hiller makes in his petition is that he has never been given a meaningful opportunity to litigate the question of whether the Act was violated in his case.

As the State argued in the section I of this response, Hiller did get a meaningful opportunity to make a complete offer of proof on this issue, and -- based on that offer of proof -- he received a ruling (adverse) on the factual issue of whether the Act was violated.

But even under Hiller's construction of the proceedings below, his predicament arises from a change in the applicable Alaska law which occurred while he was exhausting his appellate remedies in the Alaska courts. According to Hiller, his suppression motion was denied because Alaska law at that time (under Harker I) would not grant him the remedy of suppression even if the Posse Comitatus Act had been violated; he asserts that his appeal to the superior court was decided against him on the same grounds, and that the court of appeals's refusal to review his case was ostensibly based on the same reason.

Then the Alaska supreme court changed the law, overruling Harker I's holding that the exclusionary rule would

not apply to violations of the Posse Comitatus Act. Instead, under the supreme court's decision in Harker II, this issue is expressly left open again. The problem confronting Hiller (under his view of the case) is that Alaska law now says he was entitled to a hearing and a ruling on the issue of whether the actions of the airmen in his case violated the Posse Comitatus Act, but his channels of direct appeal have been exhausted.

This result, however, has not stemmed from the malice of the Alaska courts, nor has it arisen from any failure of the Alaska courts handling his case to grant Hiller his procedural rights: each court (district, superior, court of appeals) was simply following the applicable law at the time on the Posse Comitatus issue -- and then the state supreme court changed the applicable law.

To the extent that this turn of events raises a due process problem, Alaska law provides Hiller with a remedy. Under Alaska Criminal Rule 35(c)(7),

Hiller may file an action to have his conviction re-opened on the ground "that there has been a significant change in law, whether substantive or procedural, applied in the process leading to [his] conviction ..., when sufficient reasons exist to allow retroactive application of the changed legal standards".

Without pre-judging the merits of such an action -- were one to be instituted by Hiller -- it certainly seems more appropriate for Hiller to raise his grievance under this procedure allowed by state law rather than raise it for the first time in a petition for writ of certiorari.

CONCLUSION

The State of Alaska believes that the facts asserted by Hiller don't give rise to any possible violation of the Posse Comitatus Act, and that the trial judge so found.

But even if Hiller did have a colorable claim, he should not be asking this Court to issue a writ of certiorari in this case: even under Hiller's view of the case, no hearing on the Posse Comitatus issue was held, no ruling was rendered on this issue, and the Alaska supreme court has expressly left undecided the question of whether the exclusionary rule should apply to violations of the Posse Comitatus Act. The controversy is simply not ripe.

To the extent that Hiller has been frustrated in his attempts to have his claim heard by the Alaska supreme court's new ruling in this area while Hiller was still pursuing the appeal process, a remedy is available to Hiller under state law and Hiller should pursue this remedy before invoking the discretionary jurisdiction of this Court.

Respectfully submitted this 12th day of November, 1983.

NORMAN C. GORSUCH
ATTORNEY GENERAL

By: David Mannheimer
David Mannheimer
Assistant Attorney General